

MAGISTRATE'S CRIMINAL APPEAL.

Hwang Yang Choo for the appellant.*Syed Hamzah bin Tahir* (Federal Counsel) for the respondent.

Rigby J.:—The appellant in this case was convicted by the learned President, sitting in the Sessions Court, Kota Bharu, of an offence of abducting a woman in order that she might be forced to illicit intercourse, contrary to section 366 of the Penal Code, and sentenced to two years' imprisonment to be followed by one year's Police supervision. He now appeals against both conviction and sentence. There was abundant evidence to justify the conviction.

Police supervision may well be justified in cases where a man is a habitual criminal who commits offence of burglary or housebreaking or theft. This, however, in my view is not the type of case which warrants the imposition of Police supervision. The order for Police supervision is accordingly set aside. The sentence of two years' imprisonment is confirmed.

I may add that it is only with some doubt that I refrain from increasing the sentence.

Order accordingly.

Solicitors: *Pillai, Lim, Lee & Hwang.*

CHONG MOONG SENG v.
PUBLIC PROSECUTOR

[Cr. R. J. (Buhagiar J.) May 26, 1956]

[K. L. — Criminal Revision No. 10 of 1956]

Registration and Licensing of Businesses Ordinance, 1953, s. 19(1) — Offences under — Term of imprisonment not mandatory.

In this case the learned Judge considered the effect of the provisions of subsection (1) of section 19 of the Registration and Licensing of Businesses Ordinance, 1953, under which a person who is found guilty of certain offences is "liable to imprisonment . . . and to a fine", and held that under that subsection a sentence of imprisonment is not mandatory.

Re Wong Kup Sing⁽¹⁾ reversed.

Case referred to:—

(1) *Re Wong Kup Sing* (1955) M.L.J. 147.

CRIMINAL REVISION.

Ng Kok Thoy for the appellant.*J. G. Adams* (Federal Counsel) for the respondent.

Buhagiar J.:—In this case one Chong Moong Seng, Managing Partner of Thoong Joo Pawn Shop, Kuala Lumpur was charged under section 11(2) of the Registration and Licensing of Business Ordinance, 1953, punishable under section 19 thereof.

At the trial, one Chong Yean Fong, partner in the said business appeared when the defendant's name was called. He pleaded guilty to the charge and was convicted and sentenced to imprisonment for three days and to a fine of \$300 or in default one month's imprisonment.

On these circumstances the Deputy Public Prosecutor informed the Court that he could not support the conviction. I therefore exercised the powers of revision and set aside the conviction and sentence.

I may also add here that since giving the grounds of decision in *Re Wong Kup Sing*⁽¹⁾ I have had the opportunity of considering further the effect of the provisions of sub-section (1) of section 19 of the said Ordinance under which a person who is found guilty of certain offences is "liable to imprisonment . . . and to a fine". In the present case the Deputy Public Prosecutor submitted that under that sub-section a sentence of imprisonment is not mandatory. I agreed with the submission and hold that under the section a term of imprisonment is not mandatory.

Appeal allowed.

NEELAKANDAN v. PUBLIC PROSECUTOR

[A. Cr. J. (Buhagiar J.) April 6, 1956]

[K. L. — Criminal Appeal No. 9 of 1956]

Penal Code, ss. 361 and 363 — Kidnapping a female minor under 16 years of age from the lawful guardianship of her father — What constitutes the offence.

The facts in this case were shortly as follows:— The female minor concerned was born on April 20, 1940 and at the relevant time she was a student at the Convent, Kuala Lumpur and she was living with her lawful parents. On October 27, 1955 at about 2 p.m. the girl told her mother that she wanted to go to a concert to be held at the Convent, which is about three miles from her house. The mother accompanied her to the bus. The girl did not go to the Convent but went instead to a house of an old lady in Petaling Jaya. The appellant arrived there a short time afterwards and had sexual intercourse with the girl. At about 4.30 p.m. on that day the house was raided by the Police; the appellant and the girl were taken to the police station. The girl was subsequently taken to her parents. Neither the father nor the mother of the girl had given their consent allowing their daughter to be out with the appellant. The evidence showed that the girl had been seeing the appellant before without her parents' consent.

The appellant was convicted of the offence of kidnapping the girl from the lawful guardianship of her father, an offence under s. 363 of the Penal Code and sentenced to 18 months imprisonment. He appealed and the main ground of appeal was that the facts as disclosed did not amount to an offence of kidnapping.

Held: (1) the offence is committed if the taking away takes place without the consent of the lawful guardian, the consent of the minor is immaterial; (2) it is not necessary for the commission of the offence that the accused should make use of force or fraud, a mere leading of a not unwilling child is sufficient to constitute taking or enticing; (3) it is quite clear in the present

case even assuming as the appellant stated that his meetings with her were according to previous arrangements made by her, there was sufficient inducement on the part of the appellant to entice the girl from her parents; (4) the length of detention by the accused person is not a factor to be taken by itself, it is necessary to consider whether the purpose for which the taking away was consistent or inconsistent with the relation of father and child; if such purpose is inconsistent with such relationship then the offence is committed no matter how short the time of detention; (5) in this case the behaviour of the appellant at the house in Petaling Jaya, which was clearly the purpose for which he met the girl there, was undoubtedly inconsistent with the relationship of parents and child, and therefore the appellant was rightly convicted; (6) the fact of the girl being a consenting party is a matter to be taken into consideration in dealing with sentence and therefore in this case the sentence should be reduced to one of four months.

Cases referred to:—

- (1) *R. v. Baillie* (1859), 8 Cox 238.
- (2) *R. v. Miller* (1876), 13 Cox 179.
- (3) *R. v. Hankees* 16 Cox 257.
- (4) *R. v. Meadows* 1 C. & K. 399.
- (5) *R. v. Handley* (1859), 1 F. & F. 648.
- (6) *R. v. Kipps* (1850), 4 Cox 167.
- (7) *R. v. Robins* (1844), 1 C. & K. 456.
- (8) *R. v. Biswell* (1847), 2 Cox 279.
- (9) *R. v. Hibbert* (1869), L.R. 1 C.C.R. 184.
- (10) *R. v. Olifer* (1866), 10 Cox 402.
- (11) *R. v. Jarvis* (1902), 20 Cox 249.
- (12) *R. v. Timmins* (1860), Bell 276.
- (13) *R. v. Mycock* (1871), 12 Cox 28.

MAGISTRATE'S CRIMINAL APPEAL.

P. P. Nair for the appellant.

J. G. Adams (Federal Counsel) for the respondent.

Buhagiar J. :— This is an appeal against conviction and sentence for an offence of kidnapping from lawful guardianship punishable under section 363 of the Penal Code; the appellant was charged in that on the 27th October, 1955 he kidnapped one L, a female minor under sixteen years from the lawful guardianship of her father.

The evidence is briefly as follows: L, (P.W.3) was born on the 20th April, 1940. At the relevant time she was a student at the Convent, Kuala Lumpur and she was living with her lawful parents, (P.W.1 and P.W.2). On the 27th October, 1955, at about 2 p.m. L told her mother (P.W.2) that she wanted to go to a concert to be held at the Convent, which is about three miles away from her home. The mother accompanied her to the bus. L did not go to the Convent, but went instead to a house of an old lady (P.W.4) in Petaling Jaya; the appellant arrived there a short time after L. P.W.4 left the house to do some

shopping and locked the front door. The appellant had sexual intercourse with L. At about 4.30 p.m. on that day, the house was raided by the Police; and the appellant and L were taken to the Police Station. P.W.3 was taken to her parents by the Police at 10.30 p.m. Neither the father nor the mother of L had given their consent allowing their daughter to be out with the appellant, and, according to L, she had been seeing the appellant without her parents' knowledge.

The appellant lives in a house opposite that of L's parents. Some time in January, 1955, L was drawing water from a well, felt giddy and fell in the well; the appellant rescued her. Since then the appellant seems to have taken a liking to the girl. On at least three occasions, i.e. in August, September and October, 1955, L had been with the appellant in P.W.4's house at Petaling Jaya. L says that she was threatened by the appellant, and, according to her, the appellant had contemplated marriage since July, 1955.

In his defence the appellant said that after the well incident he and L became friendly; that L used to go to talk to him in his house and he also used to talk to her in her house in her mother's presence. He denied threats. L brought him cakes on her birthday in April, 1955; he also stated that the meetings at Petaling Jaya were according to previous arrangements made by L. He added that he did not speak to her mother about his liking L because L said that she would tell her mother herself and that L's mother knows "all about this". He denied that on previous meetings he had made ill-suggestions to L.

The appeal has been lodged on the following grounds:—

- (a) that evidence as to what happened at Petaling Jaya should not have been admitted in evidence;
- (b) that the facts as disclosed do not amount to an offence of kidnapping; and
- (c) that the sentence is excessive.

With regard to the first ground it was stated that that evidence amounted to admission of evidence of an alleged offence with which the appellant was not charged and the admission of such evidence was prejudicial to the appellant. I do not consider that there is any substance in this; the alleged offence with which the appellant has not been charged is presumably that of rape but the evidence clearly shows that such charge could not be substantiated; the girl is over fourteen years and it is quite clear that sexual intercourse took place with her consent, the whole of the evidence clearly shows that the girl was not in the least affected by the appellant's threats, if any, but submitted to him on various occasions willingly.

Furthermore, such evidence is relevant to show that the taking away was not consistent with the relation of father and child, and there was taking or enticing out of the keeping of the lawful guardian.

With regard to the second ground of appeal it was submitted that the learned Magistrate should have found on the evidence that the appellant did not either take away or entice L from the guardianship of her father, that L left the guardianship of her father of her own accord with the permission of her mother, and that the appellant and L have since January 1955 been on mutually affectionate terms and that since then L has been meeting the appellant without any inducement from the appellant.

These submissions raise three points for decision on this appeal, namely,

- (a) the consent of the guardian,
- (b) the consent of the minor, and
- (c) the length of detention necessary.

Before dealing specifically with these points, it is convenient at this stage to make some general observations on the offence of kidnapping under section 361 of the Penal Code. The provisions of this section (taken textually from section 361 of the Indian Penal Code) have been manifestly drawn from sections 55 (abduction) and 56 (child stealing) of the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100). Under the Penal Code, abduction, which is dealt with in section 362, is only a means or a subsidiary or auxiliary act; it is not an offence in itself, it becomes an offence and punishable only when the act is done with one or other of the intents specified in the following sections. Sections 55 and 56 of the English Act are wider and more general in their terms and there are substantial differences between the offences under those sections and the offence under section 361 of the Penal Code. Thus to mention, one important difference, under the English sections the offence is committed when the child or the unmarried girl is taken out of the "possession" of the parent or guardian, while section 361 of the Penal Code uses the words "out of the keeping of the lawful guardian". In England a number of cases have been decided to determine when a guardian ceases to be in "possession", e.g. *R. v. Baillie*⁽¹⁾; *R. v. Miller*⁽²⁾ and *R. v. Hankees*⁽³⁾. In view of the different wording in the Indian Penal Code and in the local Code, such cases would have been decided differently in India and in this country. In such matters the English cases must be applied cautiously as aids in the construction of section 361. There are, however, other ingredients in the offences under the English Act and under section 361 which are common and on such matters Indian Courts have

relied on English decided cases and can be referred as authorities in interpreting section 361.

It is clear in the first place that the offence is committed if the taking away takes place without the consent of the lawful guardian. This is specifically laid down in section 361. Under section 55 of the English Act the offence is committed if the taking away is 'against the will' of the parent and in section 56 the absence of consent is necessarily implied. The consent must be a free consent and in accordance with section 90 of the Penal Code. Such consent implies knowledge of the destination of the minor and the purpose for which the minor is being taken away. In the present case there was no consent of the parents allowing the child to go with the appellant at all.

With regard to the consent of the minor such consent is immaterial for the commission of the offence; this is settled in both English and Indian decided cases. It is not necessary for the commission of the offence that the defendant make use of force or fraud. Questions have arisen in England whether decoying or enticing away as distinct from actual taking falls within the abovementioned sections of the Act and *R. v. Meadows*⁽⁴⁾ has, in the past, been relied on for the proposition that it does not fall within section 55 (formerly section 20 of the 9 Geo. 4, c. 31); but that case has not been followed in many subsequent cases and it is now established that persuasion or blandishment by the defendant to a girl to leave her home, if effective, is within the statute; as Wightman J. told the jury in *R. v. Handley*⁽⁵⁾ it is sufficient if moral force was used as to create a willingness on the girl's part to leave her father's house. It is no legal excuse for the offence that the defendant made use of no other means than the common blandishments of a lover. Thus in *R. v. Kipps*⁽⁶⁾ there was no suggestion of any force or fraud used by the prisoner in inducing the girl to consent to elope with him; it was urged that there was no taking within the meaning of the Act, as the girl went voluntarily with the prisoner, and *R. v. Meadows*⁽⁴⁾ was relied upon; for the Crown *R. v. Robins*⁽⁷⁾ and *R. v. Bismell*⁽⁸⁾ were cited. Maule J. said:—

"If the construction apparently put upon the statute in *R. v. Meadows* be the right construction, the Act can hardly ever be violated, except in the case of children in arms. It rarely or never happens that the abductor takes away a girl of fourteen or fifteen in his arms or upon his back; so that such an interpretation would make the statute inoperative. The law throws a protection about young persons of the sex and within the age specified by the statute. It has been determined by the Legislature, that at that age young females are not able to protect themselves or give any binding consent to a matter of this description. It is therefore quite immaterial whether the girl abducted consent or not; if her family, that is to say, those who under the statute may lawfully have the possession and control over her, do not consent to her departure, the offence is completed".

There are decided cases where it might appear that the question of the girl's consent is material that is cases where the active part in going away is by the girl and not by the defendant; in these cases, however, the ground for acquittal was not the question of the consent of the girl but on the circumstances from which it might be inferred that the prisoner did not know, or had no reasonable cause to know that the girl was under the care of a guardian. Thus in *R. v. Hibbert*⁽⁹⁾ the prisoner met in the street a girl under sixteen, and persuaded her to go with him to a neighbouring city. He there seduced her, and afterwards, on the same day, accompanied her back, and parted with her in the street where he had met her. The girl lived with her parents at home, and immediately returned there. The prisoner made no inquiries, and had no knowledge of whether the girl's parents were even living or not, but he did not believe she was a prostitute. Held, that there was no evidence to support a conviction under section 55.

It seems that a man is not bound to return a girl under sixteen to her father's custody when she has left home without any inducement and come to him, *R. v. Miller*⁽²⁾, but if he has at any time held out an inducement to her, and she, acting upon it, comes to him at a time unexpected by him, and he then induces her to continue away from her father's custody, he is guilty, *R. v. Olifier*⁽¹⁰⁾. A mere leading of a not unwilling child is sufficient to constitute taking or enticing.

This is not a case where it can be said that the suggestion to go away came from L herself and that the appellant merely yielded to her suggestion; in such circumstances Jelf J. in *R. v. Jarvis*⁽¹¹⁾ directed the jury as follows:—

"And even if you do not believe . . . that he did what he was morally bound to do—namely, tell her to return home—that fact is not by itself sufficient to warrant a conviction; for if she was determined to leave her home, and showed prisoner that that was her determination, and insisted on leaving with him—or even if she was so forward as to write and suggest to the prisoner that he should go away with her, and he yielded to her suggestion, taking no active part in the matter, you must acquit him. If, however, prisoner's conduct was such as to persuade the girl, by blandishments or otherwise, to leave her home either then or some future time, he ought to be found guilty of the offence of abduction".

It is to be noted, however, that this decision is contrary to *R. v. Biswell*⁽⁸⁾.

It is quite clear that in the present case, even assuming as the appellant stated that his meetings with L were according to previous arrangements made by her, there was sufficient inducement on the part of the appellant to entice L away from her parents, and her consent is immaterial.

With regard to the length of detention necessary for the commission of the offence, I am not aware, and none have been quoted to me, of any cases where this point was decided by the Indian Courts, but the commentaries on the Indian Penal Code generally accept the view that length of detention is immaterial and in support of this view they rely on the English case of *R. v. Timmins*⁽¹²⁾. I do not think, however, that that case is authority for the proposition that length of detention is in all cases immaterial; it is clear that the judgment was limited to the particular facts of that case. The facts were that the prisoner was well known to the girl, and she had on a former occasion slept with him a whole night; and that on a Sunday she met the prisoner, and they went to London together, and spent three days in visiting places of public entertainment, sleeping together at night, and on Wednesday morning, on getting up, the prisoner said to her, 'I'll go to work, and you go home': they separated, and the girl went home; the father swore that his daughter was absent without his knowledge and against his will. The jury found that the father did not consent, and that the prisoner knew he did not consent, and that the prisoner took the girl away with him in order to gratify his passions, and then allowed her to return home, and did not intend to keep her away permanently. Upon a case reserved upon the question, whether, on the facts so found, any offence had been committed under statute, Erle C.J. delivered judgment:—

"We are of opinion that the conviction must be affirmed. The statute was passed for the protection of parents, and for preventing unmarried girls from being taken out of the possession of their parents against their will; and it is clear that no deception or forwardness on the part of the girl in such cases can prevent the person taking her away from being guilty of the offence created by this section. The difficulty which we have is to say what constitutes a taking out of the possession of the father. The taking away might be consistent with the possession of the father, if the girl went away with the party intending to return in a short time; but when a person takes a girl away from the possession of her father, and keeps her away against his will for a length of time, as in this case, keeping her away from her home for three nights, and cohabiting with her during that time, we think the evidence justified the jury in finding the taking to be a taking out of the possession of the father within the meaning of the statute. The prisoner took the girl away from under her father's roof, and placed her in a situation quite inconsistent with the father's possession. In our judgment, therefore, the jury were justified in their verdict by the evidence before them, which we consider to be the point submitted to us, although the prisoner did not intend the taking to be permanent, but when his lust was gratified intended to cast the girl from him. We limit our judgment to the facts of this particular case. It may be that a state of facts might arise upon which the offence would be complete in law when the girl passed her father's threshold, as where she is taken away with the intention of keeping her away permanently; but we mean it to be understood, that, although we affirm this conviction, we do not intend to say that a person would be liable to conviction under the section if it should appear that the taking was intended to be temporary only, or for a purpose not

inconsistent with the relation of father and child. It is sufficient for us to say that in this case the conviction was justified by the evidence".

In my opinion, according to this judgment the length of detention is not a factor to be taken by itself; it is necessary to consider whether the purpose of the taking away was consistent or inconsistent with the relation of father and child; if such purpose is inconsistent with such relationship then the offence is committed no matter how short the time of detention. (See also *R. v. Baillie*⁽¹¹⁾). In the present case the behaviour of the appellant at the house in Petaling Jaya, which is clearly the purpose for which he met L there, is undoubtedly inconsistent with the relationship of parent and child.

As regards conviction the appeal must be dismissed.

With regard to sentence, it was submitted that in the circumstances of this case a term of imprisonment for a period of eighteen months is excessive. As pointed out earlier, the fact that a girl being a consenting party cannot absolve the appellant from the charge, but it is a matter to be taken in consideration in dealing with sentence, (see the summing up of Wills J. in *R. v. Mycock*⁽¹³⁾).

I think that in the present case it can fairly be said that L voluntarily and, willingly went to meet the appellant at the agreed place and in such circumstances I consider that a term of imprisonment of four months is an adequate sentence, and I, therefore reduce the sentence from eighteen to four months.

Order accordingly.

MOHAMED KASSIM v. REG.

[A. Cr. J. (Spenser Wilkinson J.) April 11, 1956]

[Penang — Criminal Appeal No. 68 of 1955]

Penal Code s. 304A — Causing death by a rash act not amounting to culpable homicide.

Summary trial — Discretion of prosecution in calling witnesses — Duty of Court at end of prosecution case — Criminal Procedure Code (Cap. 21), s. 182(f).

In this case the appellant was charged with an offence under s. 304A of the Penal Code. The undisputed fact was that the appellant whilst driving a car No. W. 1496 along the main road near Nibong Tebal knocked into a small boy aged eight as a result of which the boy died. The prosecution called the wife of the accused who said that the boy was running across the road. Two other prosecution witnesses said that the boy was walking along his left side of the road either on or very close to the grass verge. The learned President of the Sessions Court said in his grounds of judgment, *inter alia*: "Of these two stories I was more inclined to believe at the close of the prosecution case the story of P.Ws. 6 and 7 than that of P.W. 8; but I found that in either case I was satisfied on the prosecution evidence that the accused was driving rashly and that his brakes were inefficient; and so I called upon the defence". The accused gave evidence

which confirmed that of his wife P.W. 8. The learned President thereupon found the appellant guilty under s. 304A of the Penal Code.

Held: (1) in view of the provisions of s. 182(f) of the Criminal Procedure Code (Cap. 21) the Court is bound at the conclusion of the case for the prosecution to decide definitely which, if either, of two possible but incompatible versions of the facts has been proved; (2) as the learned President had failed to do this in this case, the appeal must be allowed.

Semle: In a summary trial the prosecution need not call every witness from whom a statement has been taken. The prosecution has a discretion in this matter but the discretion must be exercised fairly.

Cases referred to:—

- (1) *Public Prosecutor v. Lee Pak* (1938) F.M.S.L.R. 1; (1937) M.L.J. 265.
- (2) *Teh Lee Tong v. R.* (1956) M.L.J. 194.
- (3) *Adel Muhammed El Dabbah v. Attorney-General for Palestine* (1944) A.C. 156; (1944) 2 All E.R. 139.

MAGISTRATE'S CRIMINAL APPEAL.

Lim Cheng Ean for the appellant.

F. G. Cooke (Federal Counsel) for the respondent.

Spenser Wilkinson J.: — The appellant was charged in the Sessions Court as follows:—

"(1) That you on 29.5.55 at about 3.35 p.m. at 22 mile-stone Main Road, Nibong Tebal, P.W. South being the driver of a motor car No. W. 1496, did cause the death of one Thannabalan s/o Balakrishnan by doing a rash act not amounting to culpable homicide, to wit by knocking down the said Thannabalan s/o Balakrishnan and that you have thereby committed an offence punishable under s. 304A of the Penal Code.

(2) That you on the same date, time and place being the driver of a motor car No. W. 1496 did fail to maintain the brakes in good and efficient working order and that you have thereby committed an offence under s. 98 of the Motor Vehicles (Construction and Use) Regulations, G.N. 944/48 and punishable under s. 8 of the Road Transport Proclamation No. 17/45".

I am not at all sure that these charges ought to have been tried together but as this point was not raised and the appeal dealt only with the first charge I need not consider this point.

The undisputed fact was that the appellant whilst driving Car No. W. 1496 along the main road near Nibong Tebal knocked into a small boy aged eight as a result of which the boy died.

Paragraph 3 of the grounds of judgment of the learned President reads as follows:—

"The only eye witnesses to the accident were P.Ws. 6, 7 and 8 and the accused. P.Ws. 6 and 7 said that the boy was walking along on his left side of the road either on or very close to the grass verge; and that the car, coming up behind him, swerved into him when meeting an on-coming lorry; and that the boy did not run across the road. P.W. 8, the wife of the accused and a passenger in his car said that the boy was running across the road from the car's right to its left with his head down; that there was no other vehicle on the road at the time; that visibility was good; and that the road was straight and clear. Of these two stories I was more inclined to believe at the close of the prosecution case the story of P.Ws.